

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RASHIKA PORTER,

Plaintiff,

vs.

CORECIVIC, Inc., et. al

Defendants.

CASE NO. 4:20-cv-02001-BYP

JUDGE BENITA Y. PEARSON

**MOTION TO STRIKE DEFENDANT'S MOTION
TO DISMISS PLAINTIFF'S FIRST AMENDED
COMPLAINT (ECF No. 16)**

NOW comes Plaintiff Rashika Porter, by and through undersigned counsel, and files this Motion to Strike Defendant's Motion to Dismiss Plaintiff's First Amended Complaint (ECF No. 16) pursuant to Civ. R. 12(b)(6) filed with this Court on April 12, 2021. For cause, Plaintiff asserts Defendant's Motion should be struck due to its untimely filing under Civ. R. 12(b) due to Defendant having previously filed a responsive pleading to Plaintiff's First Amended Complaint on March 4, 2021 (ECF No. 14). As such, Plaintiff respectfully requests this Court strike Defendant's Motion. A Memorandum in Support is attached hereto and incorporated by reference as if fully rewritten herein.

Dated this 12th day of May, 2021.

Respectfully Submitted,

/s/Seneca Konturas

Seneca Konturas, Esq.

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MEMORANDUM IN SUPPORT

On Jan. 29, 2021, all Defendants other than Officer Daniel filed an original Motion to Dismiss Plaintiff's [original] Complaint (ECF No. 11).

On Feb. 22, 2021, this Court dismissed Plaintiff's claims against Officer Daniel, without prejudice, and ordered all other Defendants to file an answer to Plaintiff's Complaint (ECF No. 12).

Following this Court's Order, Plaintiff's counsel conferred with opposing counsel and gained Fed.R.Civ.P. 15(a)(2) consent to amend the original Complaint. Thereafter Plaintiff filed his Amended Complaint on Feb. 27, 2021 (ECF No. 13).

On March 4, 2021, the remaining Defendants filed their Answer to Plaintiff's First Amended Complaint (ECF No. 14).

On April 5, 2021, this Court issued an Order denying Defendant's original Motion to Dismiss as moot (ECF No. 15) as it solely related to Plaintiff's original Complaint, not Plaintiff's superseding First Amended Complaint.

Finally, on April 12, 2021, Defendants filed a Motion to Dismiss Plaintiff's First Amended Complaint (ECF No. 16) for failure to state a claim upon which relief may be granted pursuant to Fed.R.Civ.P. 12(b)(6) (ECF No. 16).

Plaintiff now presents this Motion to Strike Defendants' Motion to Dismiss Plaintiff's First Amended Complaint due to Defendants' untimely filing of the same.

Fed.R.Civ.P. 12(b) HOW TO PRESENT DEFENSES states, in pertinent part, "a party may assert the following defenses by motion: *** (6) failure to state a claim upon which relief can be granted ***. A motion asserting any

1 of these defenses *must* be made *before* pleading if a responsive pleading is
2 allowed." (emphasis added)

3 Here, this Court denied Defendant's original Motion to Dismiss as moot
4 following Plaintiff filing his First Amended Complaint because the First
5 Amended Complaint superseded Plaintiff's original Complaint which no longer
6 performed any function in the case. *Following* the filing of the First
7 Amended Complaint and *prior to* Defendants filing their present Motion to
8 Dismiss Plaintiff's First Amended Complaint, Defendants filed their Answer to
9 Plaintiff's First Amended Complaint.

10 The rule in Fed.R.Civ.P. 12(b) is clear and unambiguous in its language
11 stating, "a motion asserting any of these defenses must be made before
12 pleading." Included in the list of defenses that must be moved for prior to
13 filing a responsive pleading is a 12(b)(6) failure to state a claim upon
14 which relief can be granted defense. This is the exact defense Defendants
15 assert in their Motion to Dismiss. As Defendants' Motion to Dismiss was
16 filed on Apr. 12, 2021, more than one month after Defendants' filed their
17 responsive pleading answering Plaintiff's First Amended Complaint, their
18 filing was out of rule and as such, must be struck as untimely.

19
20 WHEREFORE Plaintiff respectfully requests this honorable Court strike
21 Defendants' Motion to Dismiss Plaintiff's First Amended Complaint as it was
22 untimely filed under the Federal Rules of Civil Procedure 12(b).

23
24 Dated this 12th day of May, 2021.

Respectfully Submitted,

/s/ Seneca Konturas

Seneca Konturas, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2021, a copy of this Plaintiff's Motion to Strike Defendant's Motion to Dismiss Plaintiff's First Amended Complaint was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail, postage pre-paid. Parties may access this filing through the Court's system.

Respectfully Submitted,

/s/ Seneca Konturas

Seneca Konturas, Esq. (0095328)